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Facilitating shared parenting

Introduction

2.1 This Chapter examines whether the proposed Bill, and specifically the presumption of equal shared parental responsibility, promotes shared parenting and implements the government's response to the House of Representatives Standing Committee on Family and Community Affairs report on the inquiry into child custody arrangements in the event of family separation *Every picture tells a story* (the FCAC report).

2.2 In particular, the Committee examines how the presumption of equal shared parental responsibility could facilitate shared parenting, and the impact of requiring parents who have equal shared parental responsibility to make joint decisions on major long term issues. The obligation on advisers and the court to consider the time parents spend with their children is considered and the specific problems in decision making in relocation cases.

2.3 The impact of the proposed amendments on handling of or levels of family violence and abuse, as well as contrasting concerns that the proposals do not adequately address the opportunity for making false allegations of family violence and abuse are also examined. In addition, there are recommendations to simplify the structure of Part VII of the *Family Law Act* 1975 better to focus attention on the best interests of the child. Proposed amendments to the factors that the court must consider in determining the best interest of the child are also addressed.

Presumption of joint parental responsibility

2.4 Recommendation 1 of the FCAC report stated:

> …that Part VII of the *Family Law Act* 1975 be amended to create a clear presumption that can be rebutted in favour of equal shared parental responsibility, as a first tier in post separation decision making.[1]

2.5 The Government's response to Recommendation 1 was:

> …The Government agrees with this recommendation and will introduce amendments to Part VII of the Family Law Act to require the court to apply a presumption (or starting point) of joint parental responsibility. Joint parental responsibility will mean that parents will continue to share the key decisions in a child's life after separation, regardless of how much time the child spends with each parent. One or both parents will be able to submit that the presumption is not appropriate in a particular case. The best interests of the child will remain the most important factor to be taken into account. The primary factors in determining the best interests of the child will be the benefit to the child of having a meaningful relationship with both parents and the need to protect the child from physical or psychological harm.[2]

2.6 Recommendation 2 of FCAC stated:

> …that Part VII of the *Family Law Act* 1975 be amended to create a clear presumption against shared parental responsibility with respect to cases where there is entrenched conflict, family violence, substance abuse or established child abuse, including sexual abuse.[3]

2.7 The Government response to Recommendation 2 was:

> The government agrees with this recommendation in relation to cases involving violence or child abuse. While the amendments will not introduce a separate presumption against joint parental responsibility in these cases, the courts will be required not to apply the presumption in favour of

1 FCAC report, Recommendation 1.
2 Government Response to FCAC Report, June 2005, pp.5-6.
3 FCAC report, Recommendation 2.

joint parental responsibility where there is evidence of violence or child abuse.

- The government has decided not to create a presumption against joint parental responsibility in cases involving substance abuse and entrenched conflict.[4]

2.8 Part 2 and 3 of Recommendation 3 of the FCAC report were that the Act be amended to:

- define 'shared parental responsibility' as involving a requirement that parents consult with one another before making decisions about major long term issues relevant to the care, welfare and development of children, including but not confined to education – present and future, religious and cultural upbringing, health, change of surname and usual place of residence.
- clarify that each parent may exercise parental responsibility in relation to the day to day care of the child when the child is actually in his or her care subject to any orders of the court/tribunal necessary to protect the child and without the duty to consult with the other parents.[5]

2.9 The Government response to that recommendation was:

> The government agrees with this recommendation and will introduce amendments to the Act to implement the changes proposed by the committee. The amendments will be child-focused and so will refer to the need to ensure that children are given the maximum extent possible, consistent with their best interests. The government will also make an additional change to the objects of the Act to include the preservation of a child's right to safety, in keeping with the committee's conclusions at paragraph 2.29.

2.10 Section 61DA of the draft Bill proposes a new presumption of joint parental responsibility that will be a starting point for the court in making parenting orders, except in cases involving family violence or abuse. The presumption will be able to be rebutted where there is evidence that joint parental responsibility is not in the best interests of the child.

2.11 A number of witnesses expressed concern with the term 'joint'. The Shared Parenting Council in evidence expressed disappointment that:

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4 Government Response to FCAC report, Recommendation 2, June 2005, p.5.

5 FCAC report, Recommendation 3.

> …there appears a reluctance in the draftsman to properly effect not only the presumption of shared parental responsibility but also the concept of shared parenting.[6]

2.12 The Committee does not consider that the Exposure Draft implements the government's response to the FCAC in providing a presumption of joint parental responsibility. The Committee is concerned that the term 'joint' parental responsibility may be seen by some as different from 'equal shared' parental responsibility. The Committee recommends that the term 'joint parental responsibility' be replaced with 'equal shared parental responsibility' consistent with the recommendation of the FCAC report.

Recommendation 1

2.13 **The Committee recommends that to be consistent with the recommendation of the FCAC, which the government agrees to, that all references to the term 'joint parental responsibility' in the Exposure Draft be replaced with references to 'equal shared parental responsibility'.**

2.14 The Committee considers that an obligation not just to consult but to reach decisions jointly about major long term issues will promote shared parenting and will assist in ensuring that both parents are able to have a meaningful involvement in their children's lives.

2.15 The Committee notes that this is only one of the measures in the Bill to promote shared parenting. The effectiveness of other measures is discussed later in this Chapter (see paragraphs 2.163 to 2.213).

2.16 The FCAC report makes it clear that shared decision making needs to be viewed and supported as a valued part of post separation parenting.[7] How much time children should spend with each parent is a separate consideration. The issue of time is discussed at paragraphs 2.30 to 2.59.

What does equal shared parental responsibility mean?

2.17 Where there is equal shared parental responsibility proposed section 65DAC requires that both parents jointly make decisions about major long term issues. Major long term issues are defined in subsection

6 Mr Green, *Proof transcript of evidence*, 25 July 2005, p. 28.

7 FCAC Report, paragraph 2.32.

60D(1) as including decisions relating to education, religious and cultural upbringing, health, name and significant changes to a child's living arrangements. Proposed subsection 65DAC(2) requires parents to make such decisions jointly. Subsection 65DAC(3) provides that joint decision making requires that parents have to consult each other about those matters and make a genuine effort to come to a joint decision.

2.18 On minor issues, there is no obligation on the person with the day to day care of a child to consult. The Shared Parenting Council of Australia expressed concern that:

> …the Bill does not 'clarify that each parent may exercise parental responsibility in relation to the day to day care of the child when the child is actually in his or her care subject to any orders of the court/tribunal necessary to protect the child and without the duty to consult with the other parent'.[8]

2.19 The Committee considers that section 65DAE in the Exposure Draft, which specifies that there is no need for parents to consult on issues that are not major long term ones, is adequate to address this concern.

2.20 A number of other submissions to the Committee were supportive of the inclusion of a clear definition of major long term issues.[9] However a number of submissions raised concerns that the requirement to consult on major long term issues may increase the level of litigation.[10]

2.21 The Law Society of NSW in its submission stated:

> …to impose joint parental responsibility on parents who did not parent in this fashion before separation is a recipe for conflict. It is also potentially de-stabilising for a child. Moreover, there is no guarantee that an uninvolved parent will become involved just because of the presumptions. The presumption places the committed parent in a position where he or she is subject to the power of the uncommitted parent. The presumption will, however, work best for committed parents who can communicate with each other and who are able to satisfactorily manage their conflict.[11]

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8 Shared Parenting Council of Australia, *Submission 70*, p.3.

9 See for example Shared Parenting Council of Australia, *Submission 70*, p.8.

10 See for example Family Law Section of the Law Council of Australia, *Submission 47*, p. 5 and *Proof transcript of evidence*, 20 July 2005, p.15.

11 Law Society of NSW, *Submission 81*, p.4.

2.22 In particular concerns were raised about proposed subparagraph (e) of the definition of major long term issues at section 60D. This currently provides that 'significant changes to the child's living arrangements' are a major long term issue. There is concern that this goes too far in broadening the scope of what is a major long term issue.

2.23 The Family Court in its submission expressed concerns about the apparent breadth of this subparagraph and gave evidence that this could potentially prevent a new partner moving into a residence where the child lives without a joint decision with the former spouse.[12]

2.24 The Family Law Council recommended that in order to reduce the potential for litigation about such issues and to better focus this provision on relocation cases that the paragraph be reworded as follows:

> 'changes to the child's living arrangements that make it significantly more difficult for a parent to spend time with a child.'[13]

2.25 The Attorney-General's Department in its submission noted:

> This factor is not intended to cover situations where a child relocates to another residence within the same locality, unless this produces a significant change. 'Major long term issues' is not intended to cover trivial matters.[14]

2.26 The Attorney-General's Department makes clear that while living with a new partner is not defined as a major long term issue and would not require consultation with the other parent, if having a new partner results in significant changes to a child's living arrangements, both parents will be required to consult and seek to reach agreement. The Department suggested this is appropriate given the impact on the child and on the capacity of a parent to exercise parental responsibility in relation to that child.[15] In evidence to the Committee the Department stated:

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12 Family Court of Australia, *Submission 53*, p.6. Chief Justice Bryant, *Proof transcript of evidence*, 26 July 2005, pp.15-17.

13 Family Law Council, *Submission 33,* p.5.

14 Attorney-General's Department, *Submission 46.1*, p. 8.

15 Attorney-General's Department, *Submission 46.1*, p.11.

> If you choose to form a different relationship outside the original relationship, that does not necessarily impact on the parenting of the children. It is when it impacts on the parenting of the children.[16]

2.27 While the Committee acknowledges that new expanded dispute resolution services will hopefully decrease litigation, the Committee considers that the key issue about decisions related to where a child lives is the capacity for the other parent to maintain and develop a relationship by spending time with that child. This is particularly relevant for relocation cases.

2.28 The Committee considers it would be inappropriate to legislate in a way that might allow ex-partners to be able to litigate about or even veto their spouse or former spouse's new relationships. While the Committee considers that the suggestion by the Family Law Council would assist in averting such disputes, the Committee suggests alternative wording. The Committee also recommends a note be included in the legislation to make it clear that it is not intended to include decisions about new partners.

Recommendation 2

2.29 **The Committee recommends that paragraph (e) of the definition of major long term issues, proposed for inclusion in section 60D(1) (item 6 of Schedule 1 of the Exposure Draft), be amended to 'changes to the child's living arrangements that make it significantly more difficult for a child to spend time with a parent' and that a note be added to this provision to make it clear that major long term issues do not include decisions that parents make about their new partners.**

Link between the presumption of equal shared parental responsibility and time

2.30 Proposed section 61DA which is the presumption of equal shared parental responsibility, has a note that attempts to clarify that the presumption relates solely to the allocation of parental responsibility and that it does not deal with the amount of time spent with each child. The note provides:

> The presumption provided for in this subsection is a presumption that relates solely to the allocation of parental

16 Mr Duggan, *Proof transcript of evidence*, 26 July 2005, p.66.

> responsibility for a child as defined in section 61B. It does not provide for a presumption about the amount of time the child spends with each of the parents (this issue is dealt with in section 65DAA). Joint parental responsibility does not involve or imply the child spending an equal amount of time, or a substantial amount of time, with each parent.[17]

2.31 The Attorney-General's Department in its submission explained that the note directs the reader to section 65DAA which deals with the issue of time. The Department makes it clear that notes to legislation do not have legal effect. The intention of a note is to provide assistance to readers and, in particular self-represented litigants.[18]

2.32 The Shared Parenting Council in its submission (which was endorsed by a number of groups) expressed strong concerns that such notes are 'unnecessarily negative and restrictive'.[19]

2.33 In contrast the Law Council considered the note to be very important and suggested that it be made an operative provision. The Law Council recommended addition of a provision to the effect that an order under section 65DAA does not detract from equal shared parental responsibility nor does it imply that a child must spend equal or substantial time with each parent. [20]

2.34 While acknowledging the concerns of the Law Council, the Committee considers that the meaning of equal shared parental responsibility is made clear by proposed section 65DAC which requires decisions on major long term issues to be made jointly.

2.35 The Committee concludes that the note does provide a useful cross reference to the provisions about time. However, the first two sentences of the note are sufficient for that purpose. The note will aid self represented litigants in understanding the distinction in the Act between the sharing of decision making and decisions that address the time the child spends with each parent.

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17 Item 11 Schedule 1, Exposure Draft, Family Law Amendment (Shared Parental Responsibility) Bill at subsection 61DA(1).

18 Attorney-General's Department, *Submission 46.1*, p.13.

19 Shared Parenting Council of Australia, *Submission 70*, p.3.

20 Law Council, *Submission 47.1*, p.2.

Recommendation 3

2.36 **The Committee recommends that the final sentence of the note following subsection 61DA(1) (item 11 of Schedule 1 of the Exposure Draft), dealing with the presumption of equal shared parental responsibility, be deleted.**

Obligation to consider 'time'

2.37 The Committee considers that the provisions related to the time each parent spends with their child to be a key aspect of shared parenting.

2.38 Recommendation 5 of the FCAC report was:

> The committee recommends that Part VII of the *Family Law Act* 1975 be further amended to:
>
> - Require mediators, counsellors, and legal advisers to assist parents for whom the presumption of shared parental responsibility is applicable, develop a parenting plan
> - Require courts/tribunal to consider the terms of any parenting plan in making decisions about the implementation of parental responsibility in disputed cases;
> - Require mediators, counsellors and legal advisers to assist parents for whom the presumption of shared parental responsibility is applicable, to first consider a starting point of equal time where practicable; and
> - Require courts/tribunals to first consider substantially shared parenting time when making orders where each parent wishes to be the primary carer.[21]

2.39 The government response to that report was:

> The government agrees with this recommendation in principle. Changes to the Act will require mediators, counsellors, and legal advisers to provide information about what a parenting plan is, the possible content of such a plan and appropriate organisations or individuals who can assist in the development of parenting plans. Where they are providing advice to parents about parenting plans, they would also be required to inform parents that they could consider substantially shared parenting time as an option where it is in the best interests of the child and practicable.

21 FCAC report recommendation 5.

> A judge or magistrate would be required to take into account the terms of the most recent parenting plan if the parents subsequently end up in court over a parenting issue.
>
> Changes to the Act will also require courts to first consider substantially shared parenting time when making orders in cases where there is joint parental responsibility and each parent wishes to be the primary carer. Whether substantially shared parenting time is ordered will depend on the best interests of the child.[22]

Obligation on the court

Concerns about use of the term 'substantial' rather than 'equal'

2.40 Section 65DAA of the proposed Bill requires the court to consider the child spending substantial time with both their parents in cases where the parents have joint parental responsibility, both parents want this, it is in the best interests of the child and reasonably practicable.

2.41 This provision is clearly intended to facilitate shared parenting and to implement Recommendation 5 of the FCAC report outlined above.

2.42 A number of submissions were concerned that the reference to substantial time is not adequate and does not appropriately implement the recommendation of the FCAC report. The Shared Parenting Council of Australia submission (which receives support from a number of other submissions) stated:

> The reference to 'substantial' is not adequate and 'equal time or substantially equal time is more appropriate'.[23]

2.43 In evidence it was suggested that the term 'substantial' could be taken to mean as little as 5% of parenting time.[24]

2.44 The Committee notes that in evidence the Family Court of Australia stated:

> The law lives with words like 'substantial' and 'considerable' in other contexts as well, such as property allocation. Those words are flexible but not completely meaningless.

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22 Government Response to FCAC June 2005 p.7.

23 Shared Parenting Council of Australia, *Submission 70*, p.3.

24 See Mr Miller, *Proof transcript of evidence,* 26 July 2005, p.55; and Mr Williams, *Proof transcript of evidence*, 25 July 2005, p.54.

> Experience shows that we can live with this sort of word, and, despite its lack of precision, it is better than nothing and it does tend to point people in a particular direction.[25]

2.45 Justice O'Ryan also stated:

> It is more likely that you could find that it is not reasonably practicable if you had the phrase 'equal time' as opposed to 'substantial time'. In other words, there may be more discretion to find it is reasonably practicable if you leave the phrase 'substantial time'. That is just an argument. If you have 'equal time' then it might be easier to find that the presumption should not apply.[26]

2.46 The Chief Justice suggested:

> …I think you have to bear in mind that parties do still bring their cases to court, so the argument between the parties is going to be that there should be equal time. Certainly the act talks about substantial time, but that has to be interpreted in the context of the case before you, in which the parties will make the argument for equal time.[27]

2.47 As noted at paragraph 2.86 a number of witnesses and submissions suggested proposed section 65DAA is unnecessary, as it could increase the risk of exposure to family violence or might lead in someway to displacing the best interest requirement.[28]

2.48 The Committee rejects these concerns on the basis that it is clear that the provision is only relevant where equal shared parental responsibility applies. Equal shared parental responsibility will not apply in family violence and abuse cases unless there is evidence to suggest that it is in the best interests of the child. The court will also need to be satisfied that 'equal time' with both parents is in the best interests of the child as the paramount consideration. The recommendations made by the Committee to increase the prominence

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25 The Hon Richard Chisholm, *Proof transcript of evidence*, 26 July 2005 p.18.

26 Justice O'Ryan, Family Court of Australia, *Proof transcript of evidence,* 26 July 2005, p.29

27 Chief Justice Bryant, Family Court of Australia, *Proof transcript of evidence,* 26 July 2005, p.29. See also Family Court of Australia, *Submission 53.1*, p.7.

28 See for example, Professor Belinda Fehlberg, Law School of Melbourne, *Submission 29*, p.6, Albury-Wodonga Community Legal Services, *Submission 65*, Family Court of Australia, *Submission 53*, p.29 and National Abuse Free Contact Campaign, *Submission 8*, p.6.

of provisions related to the best interests of the child should alleviate the concerns raised.[29]

2.49 The Committee also notes submissions that exactly equal time arrangements in fact may only be both in the best interests of the child and reasonably practicable in some situations.[30] The Dads in Distress representative noted:

> …having equal time in there takes the punch out of the argument. Most guys will not take 50-50. Most guys will be working and will not be able to take that equal time. But it starts at that point and you work back from there.[31]

2.50 The Lone Fathers Association noted:

> We know that in many cases completely shared or equal parenting would not and could not work because of the vast distances apart from each other that people live. But there is no reason why it might not work in places like the ACT, country towns and places like that.[32]

2.51 The position raised by the Lone Fathers Association was that:

> We believe that as a starting point the words should say 'equal parenting time'. People would then look at the law as being at least fair to both of them if they had equal parenting time as a discussion at the table and could then work out why it can or cannot work.[33]

2.52 The Committee is strongly of the view that all parenting orders should be made in the best interests of the child and has made recommendations to clarify this within the legislation. However, the Committee does not consider that the use of the term 'substantial' in section 65DAA adequately implements recommendation 5 of the FCAC report which was accepted in principle by the Government.

2.53 The Committee considers that the FCAC recommendation that courts consider 'substantial sharing of parenting time' is based on the premise that there would be consideration of 'equal parenting time'.

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29 See Recommendation 16 and 17.

30 Federation of Community Legal Centres (Vic) Inc, *Submission 31*, p.4; Albury-Wodonga Community Legal Service, *Submission 65*, p.2.

31 Mr Miller, Dads in Distress, *Proof transcript of evidence* , 26 July 2005, p. 55.

32 Mr Williams, *Proof transcript of evidence*, 25 July 2005, p.45.

33 Mr Williams, *Proof transcript of evidence,* 25 July 2005, p.45.

This is based on the discussion in the FCAC report. At paragraph 2.38 of the FCAC report that Committee stated:

> The committee also believes that shared residence arrangements should become the norm, wherever practicable, rather than the current emphasis on sole residence'.[34]

2.54 The FCAC Committee concluded:

> A key part of the committee's view of shared parenting is that 50/50 shared residence (or physical custody) should be considered as a starting point for discussion and negotiation. The committee acknowledges that there is a weight of professional opinion that stability in a primary home and routine is optimal for young children in particular. The objective is that in the majority of families, parents would consider the appropriateness of a 50/50 arrangement in their particular circumstances taking into account the wishes of the child and that each parent should have an equal say as to where the child resides.
>
> In the end how much time a child should spend with each parent after separation, should be a decision made by parents or by others on their behalf, in the best interests of the child concerned and on the basis of what arrangements work for that family.[35]

2.55 The Committee sees particular merit in the submission of the Shared Parenting Council of Australia (supported by a number of other submissions) that:

> …Recommendation 5 of the Report, was a fundamental and key recommendation arrived at after extensive community and departmental consultation, which has been accepted by the Government. The Committee [FCAC Committee] did not reject the 'notion' of 50/50 shared time in certain circumstances. It rejected the idea of a presumption of equal shared custody….
>
> Implementation of this fundamental recommendation has not been implemented in the following areas-
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> (a) the Report has not provided a process that the Courts (or counsellors, mediators and arbitrators) are to follow to

34 FCAC report, p.31.

35 FCAC report, p.32.

ensure that equal parenting time orders are considered in the first instance.

Note: This is not describing a presumption that a 50/50 shared parenting Order will be the likely Order in the majority of circumstances, but providing that this is the first style of order that a Court (or counsellors, mediators and arbitrators) will consider when it is reasonably practicable to do so after a shared parental responsibility outcome has been arrived at.

(b) The legislation has not directly provided for a Court to make equal or substantially equal parenting time orders in appropriate circumstances notwithstanding these may be opposed by one or both of the parents.[36]

Conclusion

2.56 The Committee has sympathy with the submissions and witnesses who expressed concern that the substantial time provisions may not operate to facilitate shared parenting. The Committee does not consider that a requirement to consider 'substantial' time adequately implements the recommendations of the FCAC report which was accepted in principle by the Government.

2.57 Accordingly the Committee recommends that section 65DAA be amended to provide that the court shall, in making parenting orders in situations where there is equal shared parental responsibility, consider whether equal time with both parents is in the best interests of the child and reasonably practicable.

2.58 The Committee does not consider that this recommendation reopens the debate on a rebuttable presumption of 50/50 custody, which was rejected by the FCAC Committee. The term 'custody' encompasses both parental responsibility and time. If this recommendation is implemented the Bill will provide a rebuttable presumption about equal shared parental responsibility (or decision making) and, if that applies, a requirement then to consider whether equal time is in the best interests of the child and reasonably practicable.

36 Shared Parenting Council of Australia, *Submission 70*, p. 5.

Recommendation 4

2.59 **The Committee recommends that section 65DAA be amended to provide that the court shall, in making parenting orders in situations where there is equally shared parental responsibility, consider whether equal time with both parents is in the best interests of the child and reasonably practicable.**

Obligation on advisers

2.60 Chapter 3 contains a discussion of the obligations on advisers more generally. Proposed subsection 63DA(2) provides that:

> If an adviser gives people advise in connection with the making by those people of a parenting plan in relation to a child. The adviser must:
>
> (a) inform them that, if spending substantial time with each of them is
>
> (1) practicable; and
>
> (2) in the best interests of the child;
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> they could consider the option of an arrangement of that kind.

2.61 This is also intended to implement recommendation 5 of the FCAC report which was:

> ...that the Family Law Act be amended to require mediators, counsellors, and legal advisers to assist parents for whom the presumption of shared parental responsibility is applicable, to first consider a starting point of equal time where practicable.[37]

2.62 The Government's response to the report was:

> The Government agrees with this recommendation in principle. Changes to the Act will require mediator's counsellors and legal advisers to assist parents for whom the presumption of shared parental responsibility is applicable to develop a parenting plan. Where they are required to provide advice to parents about parenting plans, they would also be required to inform parents that they could consider

37 FCAC report, recommendation 5.

substantially sharing parenting time as an option where it is in the best interests of the child and practicable.[38]

2.63 The Committee also considers that the Exposure Draft does not implement the government's response to the FCAC report, as it does not implement the recommendation of the FCAC report, which was accepted in principle by the government that advisers suggest parents consider a starting point of equal time. This view is consistent with the submission of the Shared Parenting Council of Australia (endorsed by a number of other submissions).[39]

2.64 The Committee notes that other witnesses opposed the requirement for advisers to inform separating couples that if the child spending substantial time with each parent is practicable and in the best interests of the child that they could consider the option of substantially sharing parenting time.[40] There was concern that requiring advisers to raise one type of arrangement, namely substantially sharing parenting time, will give undue authority to that arrangement, particularly considering that there is not evidence that substantially sharing parenting time is best for children in a significant proportion of cases. Despite the insertion of 'best interests of the child', the concern is that the emphasis is actually on parents' 'right' to equality of access to children, and not what is in the best interests of the child in the particular case. [41]

2.65 The Family Court raised the concern that section 63DA, about advisers, does not sufficiently indicate that the best interests of the child are paramount.[42] Its view was that in fulfilling their obligations to inform parents to consider entering into parenting plans, the matters to be dealt with in a parenting plan and where they can get assistance to develop a parenting plan (subsection 63DA(1) and 63DA(2)(b)), an adviser would clearly have to cover the issue of substantially sharing parenting time (in section 63DA(2)(a)). The Court therefore recommended that section 63DA(2)(a) be deleted. The Court's alternate, and less preferred, position was to insert the words

38 Government response to FCAC Report, June 2005, p.7.

39 Shared Parenting Council, *Submission 70*, pp. 4-5.

40 See for example, National Network Women's Legal Services, *Submission 23*, p.12.

41 See for example National Network Women's Legal Services, *Submission 23*, p.13; Dr McInnes, National Council of Single Mothers and their Children, *Proof transcript of evidence,* 20 July 2005, p. 63.

42 Family Court of Australia, *Submission 53*, p.23.

'in accordance with section 68F(2)' in sections 63DA(2)(a)(ii) and (f) so as to ensure that the appropriate matters are taken into account.

Conclusion

2.66 The Committee considers that to properly implement the FCAC recommendation which has been accepted 'in principle' by the government, the requirement in the Exposure Draft on advisers to suggest the option of substantially sharing of time should be amended in line with the FCAC report recommendation to require advisers to suggest the option of equal sharing of time. This is an important means to promote the benefit to the child of both parents having a meaningful role in their lives.

Recommendation 5

2.67 **The Committee recommends that the obligation on advisers at proposed subsection 63DA(2) (at item 14 of Schedule 1 of the Exposure Draft) should include (additional to other obligations) to:**

- **Inform parents that if the child spending 'equal time' with both parents is practicable and in the best interests of the child that they should consider this option.**

Recommendation 6

2.68 **The Committee recommends that section 63DA (at item 14 of Schedule 1 of the Exposure Draft) be amended to better focus attention on ensuring decisions made in developing parenting plans are made in the best interests of the child.**

2.69 A number of witnesses and submissions also raised concerns with the note attached to Section 63DA.[43] The note provides:

> Paragraph (a) only requires the adviser to inform the people that they should consider the option of the child spending substantial time with each of them. The adviser does not have to advise them as to whether that option would be appropriate in their particular circumstances.[44]

43 See for example Shared Parenting Council of Australia, *Submission 70*; and Men's Rights Agency, *Submission 74*, p.9.

44 Section 63DA, item 14, Schedule 1, Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill.

2.70 The Committee agrees with concerns that the note accompanying this section is unnecessarily negative. However, the Committee considers that the note is useful in particular to advisers (many of whom will not be legally qualified) and to self represented litigants.[45] The Committee recommends that the note be recast into a more positive frame.

Recommendation 7

2.71 **The Committee recommends that the note attached to proposed section 63DA (item 14 of Schedule 1 of the Exposure Draft) be redrafted as follows:**

- **Paragraph (a) requires the advisers to inform the people that they should consider the option of the child spending equal time with each of them. An adviser may, but is not obliged to, advise as to what would be appropriate in the circumstances.**

Relocation cases

2.72 The Committee heard considerable concerns about how the issue of equal shared parental responsibility affects relocation cases. As was noted by Chief Justice Bryant in evidence before the Committee:

> Relocation cases are the hardest cases that the court does, unquestionably. If you read the judgments, in almost every judgment at first instance and by the full court you will see the comment that these cases are heart-wrenching, they are difficult and they do not allow for an easy answer. Internationally, they pose exactly the same problems as they pose in Australia. I have heard them described as cases which pose a dilemma rather than a problem: a problem can be solved: a dilemma is insoluble.[46]

2.73 The Lone Fathers Association in evidence before the Committee raised considerable concerns with the courts handling of relocation cases.[47] Concerns were also raised in evidence by the Family Law Practitioners Association of Queensland Ltd. who stated that:

45 The Committee notes its Recommendation 29 at paragraph 3.155 that the issue of immunity of dispute resolution practitioners be referred to an appropriate government advisory body for research and consideration.

46 Chief Justice Bryant, *Proof transcript of evidence*, 26 July 2005. p.8.

47 Mr Williams, *Proof transcript of evidence*, 25 July 2005, p.45.

> Not uncommonly, people get up and do a runner. Very commonly, they are ordered back until conclusion of proceedings, and proceedings in those circumstances are generally expedited so they can be dealt with within, say, six months. Sometimes the court does not do that. I do not know that I necessarily agree with it when it does not.[48]

2.74 The Family Law Practitioners Association of Queensland Ltd. also noted:

> …I think it is a really difficult area to be prescriptive about. There is certainly an acceptance in family law of the right of an adult – a parent – to freedom of movement. That creates a tension between that right and the best interests of the child.[49]

2.75 The Shared Parenting Council of Australia (supported by a number of other submissions) recommended that section 68F of the Act should include a provision that:

> …should a parent wish to change the residence of a child in such a way as to substantially affect the child's ability to reside regularly with the other parent and extended family, the court must be satisfied on reasonable grounds that such a relocation is in the best interests of the child.[50]

2.76 In evidence before the Committee the Family Law Council noted that this may not be necessary. The representative stated:

> At the end of the day when the court makes a final determination in relation to where a child should live then it is the paramount principle in terms of the best interests of the child that will apply. Therefore whether it is a relocation or whether it is a dispute as to how much time a child should spend with a particular parent, the best interests of the child is the determining factor for the court.[51]

2.77 The representative also stated:

> ...I think the proposal that we are making, in terms of changes to the child's living arrangements that make it significantly

48 Mr Leembruggen, *Proof transcript of evidence*, 25 July 2005, p.24.

49 Mr Leembruggen, *Proof transcript of evidence*, 25 July 2005, p.24.

50 Shared Parenting Council of Australia, *Submission 70*, p.7.

51 Mrs Davies, *Proof transcript of evidence*, 25 July 2005, p.83.

more difficult for a parent to spend time with the child, would cover that eventuality.[52]

Conclusion

2.78 The Committee agrees with the assessment of the Family Law Council that the proposal in Recommendation 2, relating to the definition of major long term issues that need to be decided, would significantly address concerns about relocation. The Committee notes concerns about restricting the freedom of movements of parents. However, the Committee considers that there would be benefit in adding a specific provision to ensure that it is clear that relocation decisions are to be made in the best interests of the child as recommended by the Shared Parenting Council of Australia.

2.79 The Committee also considers that the provision should cover both those situations where the change in residence of one parent affects the ability of the child to either reside with the other parent (or other relatives) in situations where there is joint residence arrangements and to cover situations where there is not joint residence but the change impacts on the ability of the child to spend time with the other parent.

Recommendation 8

2.80 **The Committee recommends an additional provision be included in the *Family Law Act* 1975 that should a parent wish to change the residence of a child in such a way as to substantially affect the child's ability to either:**

- **Reside regularly with the other parent and extended family; or**
- **Spend time regularly with the other parent and other relatives,**

the court must be satisfied on reasonable grounds that such relocation is in the best interests of the child.

52 Mrs Davies, *Proof transcript of evidence*, 25 July 2005, p.84.

Exceptions to application of the presumption of equal shared parental responsibility – family violence and abuse

2.81 It is clear in the Exposure Draft that the presumption of joint parental responsibility would not apply if there were reasonable grounds to believe that a parent of the child (or a person who lives with a parent of a child) has engaged in family violence or abuse of the child (or another child who is a member of the parent's family).[53]

2.82 The Explanatory Statement describes the government's policy behind this:

> This exception recognises the impact that violence and abuse in the home of either parent can have on the ability to exercise the joint decision making requirement of joint parental responsibility.[54]

2.83 This statement is consistent with the recommendations of the FCAC. The Committee agrees that the equal sharing of parental responsibility is inappropriate where there is family violence and abuse.

2.84 Concerns were raised with the Committee that the provisions may themselves spark conflict which may lead to further family violence and abuse or create the opportunity for false allegations of family violence and abuse. There was also considerable debate about the definitions of family violence and abuse currently in the Act and about whether 'reasonable grounds' is the appropriate test to determine whether the exception is met. Almost all submissions and witnesses agreed there was a need to ensure family violence and abuse allegations are investigated at an early stage. The establishment of an investigative unit to undertake this task within the Family Court was recommended by a number of bodies.[55] These issues are discussed below [paragraphs 2.131 to 2.145].

2.85 The concerns expressed about family violence and abuse in the context of shared parenting, were also raised about the exception to

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53 Proposed subsection 61DA(2) at Item 11 Schedule 1 of the Exposure Draft of the Family Law Amendment (Shared Parental) Responsibility Bill.

54 Explanatory Statement to the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, p.4.

55 See for example National Council of Single Mothers and their Children, *Submission 20*, recommendation 6, p.5; Ms Hume, *Proof transcript of evidence*, 20 July 2005, p.53. See also Ms Hollonds, Relationships Australia, *Proof transcript of evidence*, 21 July 2005, p.20; Women's House Shelta, *Submission 35*, p.6.

compulsory attendance at family dispute resolution. That aspect is discussed in Chapter 3.

Increased risk of violence and abuse

2.86 Considerable concern was expressed that the presumption of equal shared parental responsibility (and the focus on increasing shared parenting more generally) will increase the risk of family violence and abuse occurring.

2.87 A number of submissions and witnesses suggested that despite attempts in the Exposure Draft to address the issues surrounding family violence and abuse, an unforeseen consequence of the presumption of equal shared parental responsibility is that it could result in increased risk of exposure to violence and abuse towards women and children.[56]

2.88 The concern was expressed that the emphasis on equal shared parental responsibility and the requirement to make decisions on major long term issues jointly could, and is frequently, used by abusive non-resident parents to continue a pattern of controlling behaviour.[57]

2.89 The evidence presented to support this concern primarily is based on the research done in 2001 regarding implementation of the 1995 amendments by Rhoades, Harrison and Graycar titled *The Family Law Reform Act 1995: the first three years*.[58]

2.90 In particular there was concern expressed about what would be required to meet the test of 'reasonable grounds' in the exception to the presumption. There was concern that it may be difficult to prove allegations of family violence and abuse as some people may agree to equal shared parental responsibility rather than disclose violence or abuse when it is not appropriate. [59]

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56 See for example National Network of Women's Legal Services, *Submission 23*, p.3. This submission was endorsed by a number of groups. See also SPARK Resource group, *Submission 16*, pp.1 and 7 and Dr McInnes, National Council of Single Mothers and their Children, *Proof transcript of evidence*, 20 July 2005, pp.52-54.

57 National Network of Women's Legal Services, *Submission 23,* p.9, quoting Rhoades, Graycar and Harrison, *The Family Law Reform Act 1995: the first three years, 2001* at page 2.

58 Ms Hume, National Abuse Free Contact Campaign, *Proof transcript of evidence,* 20 July 2005, p.53

59 See for example Dr Lesley Laing, University of Sydney, *Submission 25*, p.2; and SPARK Resource Centre, *Submission 16*, p.7.

2.91 This test is also applicable to the exceptions to compulsory dispute resolution discussed in Chapter 3.

2.92 The Family Court of Australia in its submission provided reference to the High Court authority in *George v Rockett:*

> …that where a statue prescribes that there must be 'reasonable grounds' for a state of mind in a reasonable person.
>
> It is not necessary for the judicial officer to personally hold the relevant suspicion or belief but it must objectively appear to a reasonable person, and not merely the alleging party, that reasonable grounds exist. Presumably, those grounds would have to be credible and sworn to.[60]

2.93 The Attorney-General's Department in its submission stated:

> …the government considers that family violence and child abuse cannot be tolerated. There are a number of provisions in the Exposure Draft which focus on ensuring that a child is protected from family violence and child abuse. The new principles in item 2 of Schedule 1 specifically refer to the need for a child to be protected from the risk of physical or psychological harm caused by family violence or child abuse.
>
> Both the presumption of joint parental responsibility (item 11, Schedule 1) and the requirement to attend family dispute resolution prior to going to court (item 9, Schedule 1), will not apply in cases involving family violence and child abuse. In those cases, the court will not be obliged to consider the child spending time with both parents.
>
> The best interests of the child will remain the paramount consideration. In determining what is in the best interests of the child, one of the primary factors that the court will need to consider is the need to protect the child from violence or harm (item 26, Schedule 1). The new format of section 68F elevates the importance of the safety of the child in the court's considerations.
>
> …Schedule 3 of the Exposure Draft contains amendments to implement new procedures for the conduct of those family law matters that do go to court. The more active case management approach will ensure that allegations of family

60 (1990) 170 CLR 104, (1990) 93 ALR 483.

> violence and child abuse are dealt with at an earlier stage in the court process. Judicial officers will be better able to ensure that appropriate evidence is before them, to assist the court to better address these issues in the proceedings.
>
> Screening for family violence and child abuse will also be a very important role of the Family Relationship Centres (announced in the 2005-06 Budget) and the centres will also be able to provide information and advice to victims of family violence about their options and about support services available. There is funding of $7 million to increase specialist family violence services and 30 new children's contact services to help ensure children and parents are protected from violence and abuse during contact.[61]

Conclusion

2.94 After considering these issues, and in particular the response of the department, the Committee concludes that the standard of 'reasonable grounds to believe', in relation to the presumption of equal shared parental responsibility, is appropriate. This is particularly so given that the consequence of a finding of family violence or abuse is that the presumption of equal shared parental responsibility will not apply and the court will need to be convinced equal shared parental responsibility is in the best interests of the child. This objective test ensures there is appropriate evidence before the court.

2.95 On the material before it, the Committee is also of the view the Bill does not substantially increase the risk of family violence or abuse occurring. In paragraphs 4.45 to 4.50 in Chapter 4, about how proceedings in children's matters are conducted, the Committee makes further recommendations to address the concerns raised about the possibility of exposure to family violence and abuse.

Increased risk of false allegations of violence and abuse

2.96 There was considerable variation in the evidence provided to the Committee about the extent to which false allegations of family violence and abuse are made in family law cases. At one extreme

61 Attorney-General's Department, *Submission 46.1*, pp.6-7.

some witnesses gave evidence that false allegations are rarely made, others suggested that it is a very common practice.[62]

2.97 The Lone Fathers' Association stated:

> In the light of this reality, it is not appropriate for mere allegations of domestic violence or abuse to be taken as sufficient reason for avoiding dispute resolution. The LFAA has seen evidence suggesting that the rate of unfounded allegations may be as high as 85%.[63]

2.98 It was suggested that fathers are falsely accused of family violence and sexual abuse in order to gain advantage in legal proceedings and to gain an apprehended violence order.[64]

2.99 Conversely, the National Network of Women's Legal Services stated:

> …It is a highly questionable notion that people would 'make up' allegations of violence or abuse in order to avoid attending free FDR where their matter might be resolved so that they can, instead, with limited or no support embark on court proceedings that may be protracted, costly or that they are unlikely to be legally aided for. People generally issue court proceedings for good reasons and as a last resort.[65]

2.100 The Chief Justice of the Family Court provided evidence that determining allegations of abuse is always difficult. She suggested that by the time these cases came to court there are usually a number of pieces of evidence to corroborate the allegations made. She later noted that:

> …There are occasions on which the court finds that the allegations are completely untrue and without merit. Most cases – and research support this now – are not maliciously false allegations. In the majority of cases the person who is making them believes for various reasons that something has happened, probably because there are all these little bits of

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62 For examples of those who do not consider false allegations occur often see Mr Kennedy, Family Law Section, Law Council of Australia, *Proof transcript of evidence*, 20 July 2005, p.17-18; and Ms Hume, National Abuse Free Contact Campaign, *Proof transcript of evidence*, 20 July 2005, p.53. For examples of those who consider false allegations are common see Mr Miller, Dads in Distress, *Proof transcript of evidence*, 26 July 2005, p.52; Mr Williams, Lone Fathers Association, *Proof transcript of evidence* , 25 July 2005, p.49 and 55.

63 Lone Fathers Association, *Submission 48*, p.3.

64 Mr Miller, *Proof transcript of evidence*, 26 July 2005, p. 52.

65 National Network of Women's Legal Services, *Submission 23*, p.6.

> information. There are some but they are much less frequent than the ones that are malicious. I would not say that there are none but the more common ones are where the party simply believes that it all happened – maybe erroneously – and at the final hearing the court will make those findings. If it is the case that a party has mischievously made allegations, or believes them to such an extent in the face of overwhelming evidence that they are simply not true, then the court will in appropriate circumstances remove the child and the child will go to the other parent.[66]

2.101 A number of witnesses from professional organisations provided evidence that false allegations were made on occasions.[67] The Law Council gave evidence that:

> We see a lot of allegations where people have really convinced themselves it is true. When they are tested it is perhaps not as bad as they thought it was. Apart from the more radical client, we do not see a great number of false allegations in that sense.[68]

Conclusion

2.102 On the evidence before it the Committee is unable to determine to what extent the allegations of family violence and abuse made in family law proceedings are actually false but accepts that these allegations do occur. The Committee considers it may be useful for longitudinal research into this issue to be commissioned from a government advisory or research body. This is discussed further at paragraphs 2.153 to 2.154 and Recommendation 14.

2.103 The Committee notes the concerns by all groups about the adequacy of existing state systems to investigate allegations and the lack of capacity of the court to investigate allegations. These concerns are compounded by the length of time it can take to obtain a judicial determination in a family law matter. Suggestions to improve the capacity to the court to gather information about investigation of

66 Chief Justice Bryant, *Proof transcript of evidence*, 26 July 2005, p.25.

67 See Ms Hollonds, Relationship Australia, *Proof transcript of evidence* 21 July 2005, pp.19-20; Mrs Roots, Catholic Welfare Australia, *Proof transcript of evidence,* 25 July 2005, pp.3-4; Mr Leembruggen, Family Law Practitioners Association of Queensland Ltd*, Proof transcript of evidence* 25 July 2005, p.25.

68 Mr Kennedy, *Proof transcript of evidence*, 20 July 2005, p.17.

allegations of family violence and abuse are discussed at paragraphs 2.131 to 2.145.

2.104 The Attorney-General's Department in its submission noted that:

> …the tests that have been set for reliance on family violence and child abuse, both as an exception to attendance at family dispute resolution and for application of the presumption, are objective tests and will require evidence.
>
> Schedule 3 of the Exposure Draft also contains amendments to implement new procedures for the conduct of those family law matters that do go to court. The more active case management approach will ensure that allegations of violence and abuse are dealt with at an earlier stage in the court process and that judicial officers are better able to ensure that appropriate evidence is before them to assist the court to better address these proceedings.[69]

2.105 In conclusion the Department noted:

> The Government will give further consideration to these issues and deal with the States and Territories to better ensure a greater emphasis on the proper investigation of these issues.[70]

2.106 While the Committee notes the objective test and the changes proposed in Schedule 3 the Committee does not consider that these measures are sufficient to address the concerns raised.

Addressing the potential for false allegations to be made

2.107 To address concerns that false allegations are made, some submissions suggested that family violence and abuse should be an exception to the presumption about equal shared parental responsibility only where it is 'substantiated' or 'proven'.[71] In contrast as noted above concerns were also raised about the difficulties in disclosure of family violence and abuse and of proving that this has occurred.[72]

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69 Attorney-General's Department, *Submission 46*, p.6.

70 Attorney-General's Department, *Submission 46*, p.7.

71 See for example Men's Confraternity, *Submission 40, pp.4-8*; Dads in Distress, *Submission 41,* p.1.

72 See for example Ms Hamey, Women's Legal Services NSW, *Proof transcript of evidence,* 21 July 2005, p.70.

2.108 The Shared Parenting Council of Australia (endorsed by a number of other submissions), recommended insertion of the word 'serious' before family violence in both the presumption and where this factor is an exception to compulsory attendance at dispute resolution.[73] In evidence the representative clarified that the concern was only in relation to the use of the term 'family violence' and not in relation to the use of the term 'abuse'.[74] As an example of what might constitute non serious violence the representative cited:

> …a loud argument outside a house, for instance. A case I had last week was mediation between a father and a mother who had an arrangement going that for some reason had broken down. He was aggravated by this, he drank too much and he went round and shouted at the mother and children inside the house 'I want to see my kids!' That was it. She applied, quite reasonably, and got an AVO. That was all settled in the mediation that followed.
>
> …no violence is good, we are not talking about quality – but there are forms of violence that are less serious than others. That is one example. A mere passing argument, for instance, can sometimes be identified as a threat of violence, but it is not serious and it is a one off situation, whereas if this particular father had got drunk and thrown a rock through the window or hit someone or went around repeatedly, of course the level of seriousness goes up.[75]

2.109 Other witnesses were concerned about this approach and thought the current definition is appropriate.[76] The Committee has considered these submissions and considers that a better approach would be to amend the definition of family violence existing within the Act to ensure greater objectivity.

Definitions of family violence and abuse

2.110 To address concerns about the impact of family violence, abuse and false allegations of family violence and abuse, there were suggestions

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73 Shared Parenting Council of Australia, *Submission 70*. See also further discussion in Chapter 3 paragraphs 3.21 to 3.60.

74 Mr Green, *Proof transcript of evidence,* 25 July 2005, p.33.

75 Mr Green, *Proof transcript of evidence,* 25 July 2005, p.34.

76 Mrs Davies, *Proof transcript of evidence,* 25 July 2005, p.87. Chief Justice Bryant, *Proof transcript of evidence,* 26 July 2005, p.24.

put to the Committee that the existing definitions of both family violence and abuse be amended. There were suggestions to both broaden and to narrow the existing definitions.

2.111 The Committee notes that the FCAC report did not contain any recommendations to amend the existing definitions of family violence or abuse although it did recommend that entrenched conflict and substance abuse should be grounds for exception to the application of a presumption of equal shared parental responsibility.[77] The government response rejected those proposed exceptions to the presumption and did not address the definition of family violence for the reasons addressed in the footnote.[78] This Committee does not propose to reopen those proposed exceptions to the presumption. The proposed Bill does not contain any amendment to the existing definitions although the definition of abuse is moved to section 4 of the Act (the general definitions section).

2.112 Family violence and abuse are currently defined in section 60D of Part VII of the *Family Law Act* 1975. The definitions were inserted into the Act as part of the amendments to the Act made in 1995.

> *Family violence* means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family to fear for, or to be apprehensive about, his or her personal well being or safety.
>
> *abuse*, in relation to a child, means:
>
> (a) an assault, including a sexual assault, of the child which is an offence under a law, written or unwritten, in force in the State or Territory in which the act constituting the assault occurs; or

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77 FCAC report, Recommendation 2.

78 'The government considers that, in relation to substance abuse, a better approach would be for the courts to take into account the effect of substance abuse on parental behaviour in deciding whether joint parental responsibility is in the best interests of the child.

In relation to entrenched conflict, it could be argued that any case that reaches a final court hearing involves entrenched conflict. Making entrenched conflict a ground for applying a presumption against joint parental responsibility could mean the courts would rarely be able to apply the proposed new presumption in favour of joint parental responsibility. The government considers that the presumption of joint parental responsibility should apply, noting that the impact of conflict and the ability of parents to communicate over parenting arrangements are matters for the courts to consider when deciding any particular case.' Government Response to FCAC report, Recommendation 2, p. 5.

> (b) a person involving a child in a sexual activity with that person or another person in which the child is used, directly or indirectly, as a sexual object by the first mentioned person or the other person, and where there is unequal power in the relationship between the child and the first-mentioned person.

2.113 The Law Council recommended that the definition of abuse be expanded to specifically refer to situations where a child witnesses violence.[79] The Queensland Law Society suggested that the existing definition of family violence is too narrow as it restricts violence as being towards a person or property of a person who is a member of the perpetrator's family. They considered the meaning is not wide enough to cover all the possible scenarios and situations in which a child may witness or be exposed to violence. The Queensland Law Society submitted the definition should be widened to include violence towards any person or property of a person.[80]

2.114 A number of submissions also suggested that where one parent has undertaken behaviour to alienate the child from the other parent that this should be included in the definition of abuse.[81]

2.115 There were also concerns raised that the formulation of abuse in relation to the presumption of equal shared parental responsibility was limited to abuse of the child by a family member or a person who lives with a family member and that this might not cover a paedophile who has abused other children but not within the family context.[82]

2.116 In contrast a number of other groups considered the definition of family violence is too wide.[83] The Shared Parenting Council of Australia in evidence noted:

> Family violence needs to be better qualified…. Left vague, it can suggest anything from a heated argument about arrangements for a child to someone hitting a person over the head with an axe. Left as it is it runs the risk of increasing litigation to the extent that it will defeat the real purpose of

79 Family Law Section of the Law Council of Australia, *Submission 47*, p.2.

80 Queensland Law Society, *Submission 30*, p.2.

81 See for example Men's Confraternity, *Submission 40,* p.9.

82 Miss Dowey, *Proof transcript of evidence,* 21 July 2005, p. 62.

83 See for example, *Submission 44,* pp.1-2.

> the bill and our general purpose, which is to protect children from serious and entrenched forms of violence and indeed conflict that impacts on them in a serious way.[84]

2.117 In evidence the Attorney-General's Department stated:

> The breadth of the definition of violence and child abuse and those sorts of issues is regularly raised with the department and the Attorney. The dilemma, however, is precisely the issues this Committee was grappling with earlier this morning – that is, what is an acceptable level of violence? The definition that is in the legislation at the moment has been there for a long time and is well understood by the courts.[85]

2.118 The Family Law Council also gave evidence that it was not concerned about the definition of family violence.[86]

Conclusion

2.119 While the Committee notes that the definitions of family violence and abuse were not an issue addressed by either the FCAC Report or the government's response the Committee has concerns that false allegations could be made and considers the definition of family violence would be better qualified by inserting an objective element into the existing definition.

Recommendation 9

2.120 **The Committee recommends that the existing definition of 'family violence' be amended by qualifying it to ensure that there is an objective element as follows:**

Family violence **means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family *reasonably to* fear for, or to be *reasonably* apprehensive about, his or her personal well being or safety.**

84 Mr Michael Green QC, *Proof transcript of evidence,* 25 July 2005, p.29.

85 Mr Duggan, *Proof transcript of evidence,* 26 July 2005, p.62.

86 Mrs Davies, *Proof transcript of evidence,* 25 July 2005, p. 87.

Penalty for false allegations

2.121 A further way to address false allegations is deterrence by ensuring appropriate penalties for the making of false allegations. A number of witnesses supported this approach.[87]

2.122 The offence of perjury currently exists in the criminal law to address false statements made in any court. In addition contempt provisions are already available within the *Family Law Act* 1975.[88] There is already a capacity for the court to impose costs although the general cost provision in the *Family Law Act* 1975 is that each party bears their own costs.[89]

2.123 Evidence was provided to the Committee that there is a perception that perjury cases are rarely prosecuted and that contempt and the general costs provision are rarely used.[90]

2.124 The Committee notes that the criminal offence of perjury is difficult to prove as there is a requirement for evidence to establish, at the standard of beyond reasonable doubt, that there was an intention to deceive. The Committee notes that the Australian Federal Police are responsible for the investigation of perjury allegations and the Department of Public Prosecutions is responsible for prosecutions.

2.125 The Lone Fathers Association recommended that sufficient funding should be provided to make possible the proper prosecution of suspected cases of perjury. [91]

2.126 While the Committee agrees that appropriate funding should be provided for investigation of the criminal offence of perjury, it considers an alternative approach may be useful. The Committee considers there is merit in an explicit provision in the Act for the imposition of cost penalties by the court dealing with the family law proceeding where false allegations are knowingly made.[92]

2.127 This approach avoids the need for separate criminal proceedings which may not be appropriate given that parents need to maintain an

87 Mr Williams, Lone Fathers Association, *Proof transcript of evidence,* 25 July 2005, p.55. See also Mr Millard, *Submission 1,* p.3.

88 See Part XIIIB of the *Family Law Act* 1975.

89 Section 117(2) *Family Law Act* 1975 and Section 117(1) *Family Law Act* 1975.

90 Chief Justice Bryant, *Proof transcript of evidence,* 26 July 2005, p.14; see also Mr Williams, Lone Fathers Association, *Proof transcript of evidence,* 25 July 2005, p.56.

91 Lone Fathers Association, *Submission 48,* p.7.

92 Mrs Davies, *Proof transcript of evidence,* 25 July 2005, p.86.

ongoing parenting relationship. It ensures that a penalty is imposed at the same time as the family court determination rather than relying on the possibility of protracted criminal proceedings at a later date. The Committee notes concerns about limitations on the courts power to investigate allegations of family violence and abuse.

2.128 The Committee notes that the government discussion paper *A new approach to the family law system* contained a proposal for a specific cost provision for false allegations that arose in the context of the compulsory dispute resolution provision. The departmental submission stated that the government decided not to proceed with that measure because there were concerns that this would discourage people from relying on the exceptions where there were genuine family violence and abuse issues. Another consideration was that the measure did not satisfy other groups who did not consider this provision would be an effective deterrent.[93] That issue is discussed further at paragraphs 3.50 -3.57 in Chapter 3.

Conclusion

2.129 The Committee concludes that the *Family Law Act* 1975 should contain an explicit provision directing the courts to impose costs penalties where they are satisfied that false allegations have knowingly been made. Such a penalty would not prevent criminal prosecution in appropriate cases. A specific provision would make clear the intention that costs should be imposed in these circumstances.

Recommendation 10

2.130 **The Committee recommends that the *Family Law Act* 1975 should be amended to include an explicit provision that courts exercising family law jurisdiction should impose a costs order where the court is satisfied that there are reasonable grounds to believe that a false allegation has been knowingly made.**

Investigation of allegations of family violence and abuse

2.131 As discussed previously, much of the concern about family violence and abuse is in the difficulty in establishing whether family violence or abuse has actually occurred. This is relevant both to ensure that appropriate protection of children and to ensure that false allegations are dealt with promptly and properly.

93 Attorney-General's Department, *Submission 46.1*, p.9.

2.132 A number of witnesses drew the attention of the Committee to provisions in New Zealand legislation.[94]

2.133 Section 60 of the New Zealand *Care of Children Act* 2004[95] requires a court to determine 'as soon as practicable' whether an allegation of violence is proven. Where the court is satisfied that there has been violence (defined as physical violence or sexual abuse[96]) the court must not make an order giving the party who committed the violent acts day to day care for the child or any contact other than supervised contact with the child unless the court is satisfied the child will be safe while with the party who committed the violent act.

2.134 There is a difficult jurisdictional issue in Australia in implementing such a regime as investigation of allegations of family violence and abuse are the responsibility of the States and Territories.

2.135 There has also been concern expressed to the Committee about the lack of evidence required for violence orders within some States and Territories.[97]

2.136 The Attorney-General's Department stated:

> ….the government has concerns that these matters are often not given sufficient priority for investigation by relevant State and Territory authorities.
>
> In relation to child abuse, the government is pleased with the national rollout of the Family Court's Magellan project and the recent extension of the Magellan project to NSW. The Magellan project involves the Family Court more actively managing parenting disputes involving allegations of serious physical and/or sexual abuse against children. It is built on inter-organisational agreements that create a series of strong collaborative arrangements between the Court and relevant State and Territory agencies, including child protection authorities and legal aid. The Family Court of Western

94 See for example Ms Hume, National Abuse Free Contact Campaign, *Proof transcript of evidence,* 20 July 2005, p.56; Ms Fletcher, National Network of Women's Legal Services, *Proof transcript of evidence,* 21 July 2005, p. 50.

95 Previously section 16B of the *New Zealand Guardianship Act* 1968

96 Section 58, *Care of Children Act* 2004 (NZ)

97 See for example Mr Williams, Lone Fathers Association, *Proof transcript of evidence,* 25 July 2005, p.48; also Mr Miller, Dads in Distress, *Proof transcript of evidence,* 26 July 2005, p .54; Mr Leembruggen, Family Law Practitioners Association QLD, *Proof transcript of evidence,* 25 July 2005, p.25.

> Australia has also implemented the Columbus project, which involves active case management by that Court of those cases that involve both allegations of child abuse and of domestic violence.
>
> In addition, the Standing Committee of Attorneys-General has established a working group to consider ways of better coordinating the Commonwealth's family law system with child protection systems at State and Territory levels. One of the issues being examined is the development of model protocols between the family courts and state agencies to ensure appropriate information is available to the family courts in cases where there are allegations of child abuse.[98]

2.137 While the Committee appreciates the value of the initiatives outlined by the department, the Committee concludes they will not fully address the concerns raised.

2.138 This issue was recognised by the FCAC which recommended:

> That an investigative arm of the Families Tribunal should also be established with powers to investigate allegations of violence and child abuse in a timely and credible manner comprised of those with suitable experience. It should be clear that the role is limited to family law cases and does not take away from the States and Territories responsibilities for child protection.[99]

2.139 The recommendation of FCAC was based on consideration of the recommendations of an earlier Family Law Council report that examined the interaction between the family law system and the State and Territory child protection systems. That report had also recommended a Commonwealth child protection body be established.[100]

2.140 The government response to the FCAC report was:

> The government notes the Committee's concerns about the need for allegations of violence and child abuse to be investigated in a timely and credible manner. As the Families Tribunal is not part of this response, the option of an investigative arm is not available. The government considers

98 Attorney-General's Department, *Submission 46*, pp.6-7.

99 FCAC report, recommendation 16.

100 Family Law Council, *Family Law and Child Protection*, September 2002.

> that, to avoid duplication, better coordination of the family law system and the States and Territories is a preferable mechanism rather than establishing additional investigative bodies. It is important that the States and Territories fulfil their obligations in respect to investigating child abuse.[101]

Conclusion

2.141 The Committee notes that a number of witnesses and submissions have suggested that as there is not to be a family tribunal, an investigative body should be attached to the Family Court of Australia.[102]

2.142 The Committee notes that the primary responsibility to investigate allegations of abuse and family violence lies with the States and Territories. The Committee is aware that investigations may not currently occur into all allegations that arise in family law proceedings.

2.143 The Committee considers that there should be a specific provision in the legislation to allow courts exercising family law jurisdiction to seek to be provided from relevant State and Territory agencies a report of any investigation that has been made into the allegations.

2.144 While the Committee recognises that not all allegations will have been investigated by the States and Territories where such reports do exist the capacity to seek reports should assist the courts to ensure that in exercising family law jurisdiction they have the capacity to quickly determine the substance of allegations made in the context of the family law proceedings and to thus ensure appropriate protections or to ensure that any false allegations are promptly addressed.

2.145 The Committee considers that this provision would be an appropriate inclusion within Schedule 3 of the Exposure Draft as a further means to promote less adversarial proceedings. The inquisitorial nature of the request by the court to the State and Territory agencies or courts is consistent with the general approach in Schedule 3.

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101 Government response to FCAC Report, June 2005 at p.14.

102 See for example Ms Hume, National Abuse Free Contact Campaign, *Proof transcript of evidence*, 20 July 2005, p.53; National Council of the Single Mothers and their Children Inc, *Submission 20*, recommendation 6, p.5.

Recommendation 11

2.146 **The Committee recommends where allegations of family violence or abuse are made in a family law proceeding that there should be an explicit provision in the *Family Law Act* 1975 giving the court power to seek reports from State and Territory agencies about the investigations by those agencies into those allegations of family violence or abuse.**

2.147 Implementation of Recommendation 11 will require cooperation with State and Territory courts and agencies to ensure that appropriate investigations of allegations does occur. The Committee notes at paragraph 2.140 above that the Government considers, to avoid duplication, better coordination of the family law system and the States and Territories is preferable to establishing additional investigative bodies.

2.148 The Committee agrees with this approach but considers that the further steps are necessary to increase liaison with the States and Territories to ensure that appropriate investigation of allegations that arise in family law proceedings does occur. The Committee considers that it would be useful for the Government to report to Parliament about the progress of these measures.

Recommendation 12

2.149 **The Committee recommends that the Government provide parliament a report on its progress in its discussions with the States and Territories about the better coordination of the Australian Government family law system and the domestic violence and child protection systems in the States and Territories.**

2.150 The Committee has more general concerns about the approaches used in the investigation of allegations of domestic violence. The Committee received evidence about the tests used to establish the existence of violence within particular States and Territories and concerns about inconsistencies in the approach.[103]

2.151 The Committee does not consider it is in a position to address those issues at this stage as they are outside of its terms of reference. The Committee recommends that a reference be given to an appropriate Parliamentary Committee to inquire into the impact of the following matters with particular reference to measures that the

103 See for example Lone Fathers Association, Submission 48 and *Submission 44*, p.2.

Commonwealth may initiate on its own or with the cooperation of States and Territory Governments to:

- Improve effective protection of persons who are or may be victims of family violence;
- Examine the effectiveness of legal and law enforcement mechanisms and their costs;
- Consider the degree to which Commonwealth, State and Territory agencies, individually or in co-operation, are able to deliver just and cost effective outcomes;
- Assess the effectiveness of initiatives in public education prevention and rehabilitation; and
- Examine the alleged incidence of false allegations of family violence.

Recommendation 13

2.152 **The Committee recommends that a reference be given to an appropriate Parliamentary Committee to inquire into the impact of the following matters with particular reference to measures that the Commonwealth may initiate on its own or with the cooperation of States and Territory Governments to:**

- **Improve effective protection of persons who are or may be victims of family violence;**
- **Examine the effectiveness of legal and law enforcement mechanisms and their costs;**
- **Consider the degree to which Commonwealth, State and Territory agencies, individually or in co-operation, are able to deliver just and cost effective outcomes;**
- **Assess the effectiveness of initiatives in public education prevention and rehabilitation; and**
- **Examine the alleged incidence of false allegations of family violence.**

2.153 As foreshadowed at paragraph 2.102 the Committee also has some concerns about the limited nature of research into the issue of family violence and abuse in family law proceedings before the

Committee.[104] The Committee is of the view that there would be a benefit to all participants in the family law system for there to be a longitudinal study of issues surrounding family violence and abuse in the family law system in particular the prevalence of false allegations and false denials.

Recommendation 14

2.154 **The Committee recommends that the government commission longitudinal research into the issue of the impact of family violence and abuse in family law proceedings.**

Application and effect of the presumption of equal shared parental responsibility in interim hearings

2.155 Subsection 61DA(3) of the Exposure Draft provides the court a discretion not to apply the presumption of joint parental responsibility in interim hearings. The Explanatory Statement provides that this covers a situation where a court will have limited evidence relating to the application of the presumption.[105]

2.156 The Shared Parenting Council of Australia stated that the non application of the presumption of joint parental responsibility in interim matters is 'unacceptable' and recommended that the court be required to consider the presumption when making interim orders.[106]

2.157 Section 61DB also provides that the court must disregard any allocation of parental responsibility that is contained in an interim order when making final orders. The Explanatory Statement of the Exposure Draft provides that this is intended to address concerns that a person may obtain an unwarranted advantage in a final hearing by a finding made at an interim stage.[107]

2.158 The Family Court of Australia and the Law Council expressed considerable concern with section 61DB. They suggested that

104 The Committee does note that there is some examination of these issues in the Rhoades, Graycar and Harrison research on the Family Law Reform Act 1995: the first three years (discussed at paragraph 2.89)

105 Explanatory Statement of the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill, p.4.

106 Shared Parenting Council of Australia, *Submission 70*, p.7

107 Explanatory Statement of the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill, p.5.

although in contested proceedings the court does not take account of the interim order, the circumstances that led to an interim order may continue to be relevant to a final order which must be made with the paramount consideration being the best interests of the child. [108]

2.159 The Law Council suggested retaining the discretion not to apply the presumption at the interim stage but that the limits of the courts consideration should be made clearer on the face of the legislation. They suggested inclusion of an explicit statement that the court should 'disregard the existence of any allocation of parental responsibility in an interim order' and that '…the court may take into account any facts or circumstances which are relevant to the making of the final parenting order whether those facts or circumstances occurred before or after making the final order.[109]

2.160 Section 61DB may have been inserted partially to address concerns that once a decision has been made about residence of the child, the length of time until a final hearing can mean that a status quo is established that is very difficult to refute. However a number of groups considered that the section fails to stop the establishment of a status quo.[110]

Conclusion

2.161 The Committee concludes that a presumption of equal shared parental responsibility should generally be applied at an interim hearing although the court should retain the discretion not to apply the presumption if it would be inappropriate. The court should continue to have regard to all the circumstances that are in the best interests of the child when making both interim and final orders. This should be made explicit in the legislation.

Recommendation 15

2.162 **The Committee recommends that the presumption of equal shared parental responsibility should generally be applied at an interim hearing although the court should retain discretion not to apply the presumption if it thought it to be inappropriate. The court should continue to have regard to all the circumstances that are in the best**

108 Mr Bartfeld QC, Family Law Section, Law Council of Australia, *Proof transcript of evidence,* 20 July 2005, pp.22-23.

109 Family Law Section, Law Council of Australia, *Submission 47.1*, p.3.

110 Shared Parenting Council of Australia, *Submission 70*, p.7.

interests of the child when making both interim and final orders. This should be made explicit in the Exposure Draft.

Other measures in the draft Bill facilitating shared parenting

2.163 While equal shared parental responsibility is about both parents sharing decisions (not time) there are a number of other measures in the draft Bill intended to facilitate shared parenting. These measures stem primarily from the FCAC report.[111]

2.164 The Attorney-General's Department in its submission stated:

> …the legislation clearly contains a number of provisions that will help to ensure that both parents have a greater share in the parenting responsibilities for their child after separation. The provisions in the Bill will ensure that children will benefit from having a meaningful involvement with both of their parents. The provisions are deliberately child focussed. The key provisions are:
>
> - Item 2 of Schedule 1 adds as an objective, ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives to the maximum extent possible consistent with their best interests.
> - Item 26 of Schedule 1 provides that a primary consideration in determining the best interests of the child will be the benefit to the child of having a meaningful relationship with both parents.
> - Item 11 of Schedule 1 provides a starting point or presumption of shared parental responsibility. Item 23 of Schedule 1 includes the new section 65DAC which clarifies that the effect of an order providing for joint parental responsibility is that decisions about major long-term issues affecting the child have to be made jointly.
> - Item 23 Schedule 1 requires the court to consider a child spending substantial time with both their parents where there is joint parental responsibility, both parents want this and it is reasonably practicable.
> - The amendments to the enforcement provisions in Schedule 2 will significantly strengthen the parenting

111 See recommendations 3 and 5 of the government's response to the FCAC report at Appendix D to this report.

> compliance regime and improve compliance with court orders providing for shared parenting.[112]

2.165 The proposed amendments are discussed in detail in paragraphs 2.166 to 2.213 below. The issue of time has been already discussed at paragraphs 2.37 to 2.67. The Committee considers the Exposure Draft generally implements the government's response to these recommendations and the Committee makes recommendations to further facilitate shared parenting and to clarify the provisions.

Amendment to the objects and principles of Part VII

2.166 The draft Bill proposes that the object provision about children in Part VII of the *Family Law Act* 1975 be amended to ensure consideration of the benefit to children of having a meaningful relationship with both parents. The Bill proposes a direct link between the objects and the list of factors the court must consider in determining the best interests of the child. The Bill also proposes an amendment to the principles provision to recognise the need to protect a child. The formulation of this provision comes from the existing list of factors to determine the best interests of the child.

2.167 The possible need for complete redrafting of the *Family Law Act* 1975 is discussed at Chapter 6. A number of suggestions were addressed to the Committee about the structure of Part VII and in particular the objects and principles in that Part.

2.168 A number of submissions and witnesses expressed concern that the paramountcy of the best interest of the child principle was difficult to locate within the Act. This is in part due to the complexity of the drafting of the Act and in particular the impact of the amendments in creating a hierarchy of factors to be considered including the objects, principles and two tiers of best interest factors.[113]

2.169 The Attorney-General's Department noted that :

> Section 65E is the guiding principle for the Divisions in Part VII that relate to the resolution of disputes by the court. The best interests of the child will continue to be the paramount consideration of the court in determining proceedings relating to children. The government does not consider that

112 Attorney-General Department, *Submission 46*, pp.7-8.

113 See for example Family Law Section of the Law Council, *Submission 47*, p.3. See in particular, recommendations 1.4 and 1.5 at viii.

> the court will have difficulty in coming to terms with the application of the principle in light of the proposed amendments to the Act.[114]
>
> The provisions that follow the objects provision (with the exception of the definitions provision) are designed to provide guidance to parties on coming to agreement about child-related matters outside of the court system. For example, Division 2 details the concept of parental responsibility and Division 4 outlines parenting plans. This is another reason for considering moving the proposed new Division 1A.
>
> From Division 5, the provisions focus on the resolution of disputes by the court and the making of court orders. Section 65E is the guiding principle for the court when making such orders. The government considers that this is a logical progression for Part VII.[115]

2.170 The best interest of the child is expressly made the paramount consideration in a number of sections of Part VII. In particular section 65E provides that it is the paramount consideration in making interim and final parenting orders. It is also the paramount consideration in subsection 63H(2) (setting aside parenting plans), subsection 65L(2) (assistance or supervision of parenting orders), section 67L (location orders), section 67(V) recovery orders, and subsection 67ZC(2) (welfare orders). A number of other sections in the Act also require consideration of the best interests of the child. The provisions related to how the court determines the best interests of the child are in subdivision B of Division 10 of Part VII.

Conclusion

2.171 The Committee agrees that the current drafting of the best interest provisions in Part VII is difficult to follow and may detract from a focus that the paramount consideration in making parenting orders is the best interest of the child. The issue of the possible redraft of the entire Act is further discussed at Chapter 6. The Committee considers the best interest provisions should be co-located at the start of the section on parenting orders in Part VII and that new Division 1A about child related proceedings could be moved to later in Part VII.

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114 Attorney-General's Department, Submission 46.2, p.2.

115 Attorney-General's Department, *Submission 46.2*, p.3.

Recommendation 16

2.172 **The Committee recommends:**

(a) co-locating section 65E related to the best interests of the child as the paramount consideration in parenting orders and section 68F related to how the court determines what is in the best interests of the child at the start of subdivision 5 of Part VII about parenting orders; and

(b) proposed Division 1A come later in the Act.

2.173 A number of witnesses also expressed concern that having an object about meaningful involvement with parents and a principle about a child's right to safety could be perceived as implying that a child's safety was subordinate to a parent's right to a meaningful involvement. There was also concern that the best interest principle is not clearly stated in the objects provision of Part VII. [116]

2.174 The Attorney-General's Department stated:

> Consideration could be given to reflecting the best interests of the child in the objects provision. The suggestion put forward by the Family Law Section of the Law Council in its submission and endorsed by the Family Court in its appearance before the Committee is a possible model.
>
> As discussed in issue 2, consideration could be given to making the safety of the child (as set out in paragraph 60B(2)(b) of the Bill) an object in subsection 60B(1).[117]

Conclusion

2.175 The Committee rejects the concern that safety is intended to be made subordinate to both parents having meaningful involvement with their child, but acknowledges that the drafting of the objects and principles is complicated and could be misleading. The objects and principles should be redrafted to ensure that there is clearer reference to the best interests of the child and to identify as part of the objects rather than as a principle the need for safety for the child. The

116 See for example National Council of Single Mothers and their Children Inc., *Submission 20*, p. 8.

117 Attorney-General's Department, *Submission 46.2*, p.3.

Committee considers some minor redrafting could address the concerns raised about this issue.

Recommendation 17

2.176 **The Committee recommends that the objects set out in proposed subsection 60B(1) of Part VII be amended to:**

(a) make more explicit reference to the need for consistency and the paramountcy of the best interests of the child; and

(b) to recognise as an object the safety of the child (as currently set out in proposed paragraph 60B(2)(b) of the Bill (as amended by recommendation 16).

2.177 There were also concerns expressed about the lack of clarity in the drafting of the new principle about safety. While the Committee notes that this is taken directly from the existing subsection 68F(2)(g) the Committee agrees that it is unnecessarily complex. The Committee also agrees with the suggestion of the Shared Parenting Council of Australia and other submissions that the term 'other behaviour' should be defined.[118]

Conclusion

2.178 The Committee considers the approach suggested in evidence by the Former Justice Richard Chisholm representing the Family Court of Australia is useful. He suggested that the principle could be made clearer by just stating that children need to be protected from physical or psychological harm from exposure to abuse, neglect or family violence.[119]

Recommendation 18

2.179 **The Committee recommends that paragraph (b) of proposed subsection 60B(2) be amended to provide that children need to be protected from physical or psychological harm from exposure to abuse, neglect or family violence. (Consistent with recommendation 17 this should become an object of Part VII rather than a principle)**

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118 See Shared Parenting Council of Australia, *Submission 70*. See also Mr Gaal and Mr Mc Naughton, *Submission 58.*

119 The Hon Richard Chisholm, *Proof transcript of evidence,* 26 July 2005, p. 3.

Best interests of the child

2.180 One thing that was common across most witnesses and submissions was acknowledgement that the best interest of the child needs to be the foremost consideration in determining post separation parenting arrangements. The Committee endorses this approach. Recommendation 16 ensures the current provisions in the proposed Bill relating to the best interest of the child are made more prominent within Part VII of the Act.

2.181 The draft Bill amends the factors that the court must consider to determine what is in the best interests of the child. In particular the draft Bill contains two primary factors that the court should give additional weight to. The first is the benefit to the child of having a meaningful relationship with both parents. The second is the need to protect the safety of the child which is currently part of the list of factors that the court must consider at subsection 68F(2) of the *Family Law Act* 1975.

2.182 This provision does not come directly from the recommendations of the FCAC report although it is mentioned in the government's response to that report as a means of assisting in facilitating shared parenting.[120]

2.183 A number of submissions were supportive of this two tier approach.[121] However, a number of other submissions and witnesses raised concerns about the operation of a two tier approach. In particular concerns were raised that the two tiers may conflict with each other and about how a hierarchy would operate.[122]

2.184 The Law Council raised concern that the two tiers were unnecessary and added to confusion about the weight to be given to those factors compared to other factors. They considered that in situations where there was conflict between these two primary factors, it would be easier to resolve where they are just a part of a larger set of factors to be considered.[123]

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120 See response to Recommendation 1 at page 5, Discussion Paper *Anew family law system; Government Response to Every Picture tells a story,* November 2004.

121 See for example, Family Law Council, *Submission 33,* p.4.

122 Mr Altobelli, *Proof transcript of evidence*, 21 July 2005, p.13; National Network of Women's Legal Services, *Submission 23*, p.14.

123 Mr Kennedy, *Proof transcript of evidence,* 20 July 2005, pp.16-17.

2.185 The Attorney-General's Department, in response, noted:

> In relation to the proposed subsection 68F(1A), the government's intention is to better direct the court's attention to the objects of Part VII of the Act. The government does not consider that this amendment will unduly complicate matters for the court. Under subsection 68F(2) the court is currently required to consider a number of factors in determining the best interests of the child.
>
> The court is therefore used to dealing with weighing competing issues and, depending on the particular circumstances of the matter, elevating the importance of one factor over another.[124]

2.186 The Attorney-General's Department, in its submission, stated:

> The government believes that elevating the two considerations to become the primary factors will lead to clearer decisions by the courts, based principally on these considerations.
>
> The intention of separating these factors into two tiers is to elevate the importance of the primary factors and to better direct the court's attention to the revised objects of Part VII of the *Family Law Act 1975*. The government considers it important to link the objectives of Part VII into operative provisions. This will lead to a more consistent focus on the court achieving the key elements of the objects of Part VII.
>
> The elevation of these considerations, particularly that relating to ensuring a meaningful ongoing relationship between parents and children, is consistent with the proposal to introduce a presumption in favour of joint parental responsibility.
>
> This change will almost certainly have an impact on how cases are decided. For example, it is likely that the outcome in relocation cases will be affected as there will now be more importance placed upon the ongoing relationship with both parents than there has been in the past. [125]

124 Attorney-General's Department, *Submission 46.2,* p.1.

125 Attorney-General's Department, *Submission 46,* p.7.

2.187 The Family Court of Australia opposed the two tier approach. In evidence before the Committee the Family Court suggested there was a structural problem:

> The real problem with section 68F(2) is that it elevates some things above others, and you just do not really know what that means. I do not know that there is any easy way to work that out. If the legislation is passed, I guess that one day I will be on a full court which will have to work it out, but I do not much relish that task.[126]

2.188 The Court also noted there is an additional concern about the primary factors overriding some quite significant things such as the views of children.[127]

2.189 The Attorney-General's Department noted the views expressed by Family Court and provided the following response:

> …what we would say is that it is not unusual for the court to have to weigh various factors and to give some greater priority than others. It is something it does all the time. The government's view is that the particular two factors that are mentioned as primary factors are indeed the factors that the court should give most weight to – and that is the intention.[128]

2.190 The Department noted:

> Where both considerations apply to a particular matter, the government anticipates that the court will then give consideration to the additional factors in subsection 68F(2) in order to determine what is in a child's best interest. For example, the willingness and ability of a parent to facilitate a close and continuing relationship between the child and the other parent or any views that may be expressed by the child.[129]

2.191 Despite the concerns raised about the two tier approach to considering the best interests of the child the Committee considers that the primary factors do draw appropriate attention to the objects

126 Chief Justice Bryant, *Proof transcript of evidence,* 26 July 2005, p.21.

127 Chief Justice Bryant, *Proof transcript of evidence,* 26 July 2005, p.22.

128 Mr Duggan, Proof transcript of evidence, 26 July 2005, p.81.

129 Attorney-General's Department; *Submission 46*.2, p.3.

provisions in a positive way and will assist to focus the attention of the court to those objects particularly in relocation cases.

Formulation of the safety provision

2.192 As discussed at paragraph 2.177 the Committee notes concerns that that the formulation of the existing section 68F(2)(g), which describes the need to protect a child, is unduly complex and that the term 'other behaviour' should be defined.[130]

2.193 The Committee endorses the suggestion of former Justice Richard Chisholm that the drafting could be made clearer by simply stating that children need to be protected from physical or psychological harm from exposure to abuse, neglect or family violence.[131]

2.194 The Committee has recommended that this approach be adopted in the formulation of the objects.[132] This approach is consistent with the intention of government that the primary considerations in determining the best interests of the child should reflect the objects of the Part.

Recommendation 19

2.195 **Consistent with Recommendation 18, the Committee recommends that paragraph 68F(1A)(b) of the Exposure Draft be redrafted to provide as a primary consideration in determining the best interests of the child:**

the need to protect children from physical or psychological harm, or from exposure to abuse, neglect or family violence.

The factors in determining best interests –'friendly parent' provision

2.196 In addition to the inclusion of primary factors to be considered in determining the best interests of a child, the proposed Bill adds an additional secondary factor the court must consider. The draft Bill provides that the court must also consider:

130 Shared Parenting Council, *Submission 70*. See also Mr Gaal and Mr McNaughton, *Submission 58*.

131 The Hon Richard Chisholm, *Proof transcript of evidence*, 26 July 2005, p3.

132 Recommendations 17 and 18.

> (ba) the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent.[133]

2.197 The Committee understands the intention of this provision is to facilitate shared parenting. This provision has become known as the 'friendly parent' provision.

2.198 A number of groups raised concern about the impact of the provision. In evidence the National Abuse Free Contact Campaign representative stated:

> …the friendly parent provision, which will systematically obstruct people from declaring issues of violence.[134]

2.199 The submission of the National Council of Single Mothers and their Children Inc. stated:

> The 'friendly parent' provision has been a manifest boon, wherever it has been implemented, to parents who use violence or abuse. Parents who use violence and abuse welcome the opportunity to threaten and harm their targets whilst protective parents seeking to avoid threats and injury have every reason to avoid the violent parent.[135]

2.200 They recommended this provision not be included. They also recommended implementation of an investigative unit into child protection (see paragraphs 2.131 to 2.145) and implementation of the Family Law Council letter of advice to the Attorney-General reviewing Division 11 of the *Family Law Act* 1975 which addresses family violence and in particular the interaction with State and Territory orders.[136]

2.201 The purpose of Division 11, set out in section 68Q, of the *Family Law Act* 1975 is to:

- Resolve inconsistencies between Division 11 contact orders and family violence orders;

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133 Item 30, Schedule 1 Exposure Draft, proposed 68F(2)(ba).

134 Ms Hume, National Abuse Free Contact Campaign, *Proof transcript of evidence,* 20 July 2005, p.55.

135 National Council of Single Mothers and their Children, *Submission 20*, p.8.

136 Family Law Council: *Review of Division 11 Family Violence*, 16 November 2003 available at http://www.ag.gov.au/agd/WWW/flcHome.nsf/Page/Letters_of_Advice_Letters_Violence_-_Division_11_of_the_Family_Law_Act_1975.

- To ensure that Division 11 contact orders do not exposes people to family violence; and
- Respect the right of a child to have contact, on a regular basis, with both the child's parents where contact is diminished by the making or variation of a family violence order; and it is in the best interests of the child to have contact with both parents on a regular basis.

2.202 The letter of advice from the Family Law Council followed a review of the operation of Division 11 by Kearney, McKenzie and Associates, prepared for the Office of the Status of Women in February 1998. That report concluded that Division 11 was not working in practice. Recommendation 1 of the Family Law Council letter of advice to the Attorney-General was that Division 11 required redrafting into clear, concise language that can be readily understood by the people who must use and implement it. Attachment A of Council's letter of advice provides a proposed redraft of Division 11. In particular they recommend:

- Redraft of 68P to provide a new definition of contact order that incorporates the elements of the current definitions of 'Division 11 contact order' and 'section 68R contact order';
- Repeal of 69Q(c) and amendment of 68T to provide a clearer statement of the principles to be applied by State and Territory courts – in particular to provide that a court must have regard to the need to protect all family members from the threat of family violence and; subject to that, the child's right to contact with both parents, provided such contact is not contrary to the best interests of the child;
- Amendment of 68T so that there shall be no power for a court of a State or Territory to make a contact order as part of a family violence proceeding; and
- Retention of the currently specified period of 21 days with respect to the operation of 68T(5).

2.203 The Shared Parenting Council of Australia in its submission endorsed the recognition of the friendly parent concept as part of the checklist of factors the court must consider.[137]

137 Shared Parenting Council of Australia, *Submission 70*, p.8.

Conclusion

2.204 The Committee concludes it is appropriate for the court to have to consider the willingness to maintain a relationship with the other parent. This is only one factor of the numerous secondary factors that the court is considering. Concerns about the impact on violence are unwarranted given that the court must consider the safety of the child as a primary consideration in determining the best interests.

Factors in determining best interests – interim and uncontested violence orders

2.205 Another proposed amendment to the factors that the court must consider when determining the best interests of the child is to limit consideration of family violence orders to final orders or contested orders (paragraph 68F(2)(j)).

2.206 A number of submissions and witnesses were supportive of this change as a means to address concerns that violence orders are too easily obtained in the State and Territory systems and often contain false allegations of family violence and abuse.[138]

2.207 The National Network of Women's Legal Services (which was endorsed by a number of other submissions), raised some concerns and recommended that this provision not be amended:

> We do not consider that this amendment will make much difference in practice as it is our experience that the Family Court pays little regard to family violence orders that are not final or contested in any event.
>
> However, this sends an unfortunate and inappropriate message about the weight to be given to orders legitimately made by other courts to promote non violent behaviour.
>
> It also fails to recognise that interim and ex parte orders are frequently obtained in urgent circumstances for good reasons, but, due to the documented problems with family violence orders processes, victims of violence can drop out of the system before obtaining a final order.[139]

138 See for example Shared Parenting Council of Australia, *Submission* 70, p. 8.

139 National Network of Women's Legal Services, *Submission 23*, p.16.

2.208 In evidence Chief Justice Bryant indicated that she does not consider this amendment to be a problem as the court would almost invariably hear about the facts that underlie it.[140]

2.209 The Department in its supplementary submission stated:

> The intention of this subsection is to ensure that uncontested interim family violence orders are not an independent factor in determining the best interests of the child. This should address concern that allegations of violence can be taken into account that were later found to be without substance.
>
> The government does not consider this amendment has the potential to place children at risk. In determining the best interests of the child , the court will consider, as a primary factor, the need to protect children from physical or psychological harm under subsection 68F(1A). The court may also have regard to:
>
> - any family violence involving the child or a member of the child's family under paragraph 68F(2)(i) of the Act; and
> - final or contested family violence orders under paragraph 68F(2)(j).
>
> If there are pending family violence orders, it will be a matter for the court in each particular case whether it chooses to wait for the determination of the issues of family violence by the State or Territory court. Alternatively, the court hearing the parenting application may draw its own conclusions about the violence as it impacts on the best interests of the child.[141]

2.210 After consideration of these issues the Committee concludes that the proposed amendment to section 68F(2)(j) is appropriate and will not significantly increase the risks of family violence occurring.

2.211 This amendment will assist in addressing the issues discussed earlier in this Chapter of the perceptions that exist that the court relies on false allegations of violence or abuse.

2.212 The Committee concludes that to assist in addressing concerns raised about the possible effect of the changes to the best interest factors in terms of family violence it would be appropriate for the Government

140 See Chief Justice Bryant, *Proof transcript of evidence*, 26 July 2005, p.26.

141 Attorney-General's Department, *Submission 46.1,* p.21.

to implement the recommendations in the Family Law Council letter of advice on Division 11 of the *Family Law Act* 1975.[142]

Recommendation 20

2.213 **The Committee recommends that Division 11 of the *Family Law Act* 1975 be redrafted into clear and concise language as recommended by the Family Law Council in its letter of advice to the Attorney-General of November 2004.**

142 Available at http://www.ag.gov.au/agd/www/Flchome.nsf/ – Attachment A of the letter of advice sets out a proposed redraft of Division 11.